

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JOSEPH BANKS d/b/a Banks Electric,

Plaintiff,

v.

No. CIV 02-445 BB/WWD

**R.E. WILLIAMS CONSTRUCTION
SERVICES COMPANY and CUMBERLAND
CASUALTY & SURETY COMPANY,**

Defendants.

MEMORANDUM OPINION
AND
ORDER DENYING MOTION TO STRIKE JURY DEMAND

THIS MATTER is before the Court on the motion of Defendant R.E. Williams Construction Services Company to strike Plaintiff's jury demand [Doc. 20]. The Court having reviewed the briefs of counsel and being otherwise advised, FINDS the motion lacks legal support and it will be Denied.

Discussion

Plaintiff Joseph Banks d/b/a Banks Electric ("Banks") filed suit against Defendant R.E. Williams Construction Services Company ("Williams") and its surety, Cumberland Casualty and Surety Company, to collect for services it allegedly provided under a construction contract. Plaintiff set forth claims alleging (1) breach of contract; (2) right

to lien foreclosure; (3) intentional misrepresentation¹; (4) open account; (5) *quantum meruit*; and (6) violation of the duty of good faith and fair dealing.² Defendant claims “Plaintiff has pled numerous different counts for essentially the same purpose, determination of the amounts owed to Plaintiff ... and foreclosure of its lien for that amount.” (Deft.’s Reply p. 1). Even if Plaintiff’s statement is correct, however, Defendant’s conclusion that “Plaintiff is not entitled to have a jury trial of what is an equitable question” (*id.* p. 2) does not follow. “[D]etermination of amounts owed” under a contract is a legal not an equitable claim. (*Id.*) Even when a plaintiff also seeks equitable remedies or combines his breach of contract with other counts, however, a claim for breach of contract entitles him to a jury trial. *Orient Atlantic Parco, Inc. v. Maersk Lines*, 740 F. Supp. 1002 (S.D.N.Y. 1990); *Temperato v. Rainbolt*, 22 F.R.D. 57 (N.D. Ill. 1958); *Paper Stylists, Inc. v. Fitchburg Paper Co.*, 9 F.R.D. 4 (N.D.N.Y. 1949).

O R D E R

The motion of Defendant Williams to strike Plaintiff’s jury demand is DENIED.

¹ This Court previously granted summary judgment on Plaintiff’s claim for negligent misrepresentation.

² This Court granted summary judgment on tort remedies for breach of the duty of good faith and fair dealing and recognized any such covenant was subsumed in the breach of contract claim.

Dated at Albuquerque this 24th day of January, 2003.


BRUCE D. BLACK
United States District Judge

For Plaintiff:

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For Defendant:

Sean R. Calvert, CALVERT & MENICUCCI, Albuquerque, NM